IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2008 Session

WHIRLPOOL CORPORATION v. SHERRY PRATT

Appeal from the Chancery Court for Davidson County
No. 00-2067-I Claudia C. Bonnyman, Chancellor

No. M2007-02534-COA-R3-CV - Filed October 17, 2008

Corporation appeals the trial court's judgment in favor of a former employee who filed suit for retaliatory discharge. Corporation argues that the former employee failed to prove two required elements of her claim for retaliatory discharge: (1) that she made a claim for workers' compensation benefits prior to her termination, and (2) that her workers' compensation claim was a substantial factor in her termination. Corporation also assigns error to the trial court's calculation of damages. We affirm the trial court's decision holding the corporation liable for retaliatory discharge but modify the amount of damages.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

M. Andrew Hoover, Pulaski, Tennessee, for the appellee, Sherry Pratt.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Sherry Pratt began working for Whirlpool Corporation in 1998 on an assembly line for the production of air conditioners. On June 26, 2000, Ms. Pratt fainted while working and fell, injuring her face and mouth and knocking out several teeth.[1] She was immediately taken to the plant's medical center and then transported by ambulance to the emergency room.

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[1] Ironically, there was no air conditioning in the Whirlpool plant where air conditioners were assembled.

While at the emergency room, Ms. Pratt gave a urine sample for drug testing. According to Whirlpool's evidence, the company had a standing order with the hospital to drug test any of its employees treated for work injuries. The hospital had contracted with Fortier, an independent contractor, to perform the drug testing, and a Fortier employee, George Carlson, came to the emergency room and handled Ms. Pratt's testing. Shortly after Ms. Pratt gave her urine sample, Mr. Carlson informed her that she had given a "cold sample."[2] Mr. Carlson's report, submitted to Whirlpool, includes the following statements:

> Patient gave a cold sample. Patient refused catheter. Patient stated that she could not give another sample. I have been with patient 2 1/2 hours. Patient also said she could not drink due to mouth injury. Patient was told if she did not give sample, she would be terminated from Whirlpool.

Ms. Pratt testified that she could not take anything by mouth at the emergency room due to her injuries and that she did not want to be catheterized. The hospital had taken two blood samples as part of its treatment of her injuries. Ms. Pratt signed the report prepared by Mr. Carlson.

There is some conflicting evidence concerning the events of June 27, 2000. Ms. Pratt testified at the hearing that she received a telephone call from Whirlpool asking her to come in and give another urine sample. She told Whirlpool that she was waiting to hear back from two dentists for an appointment and inquired as to whether the dental work would be covered by workers' compensation. Ms. Pratt testified that Doug Hagewood, Whirlpool's labor relations manager, then informed her that she was being terminated for giving a cold urine sample. At the time of the hearing, Mr. Hagewood could not recall the telephone conversation with Ms. Pratt but testified that it was his decision to terminate her. He testified that it was Whirlpool's policy that a cold sample would result in automatic termination and that there would have been no reason to get another sample.

Three days after Ms. Pratt's accident, on June 29, 2000, Whirlpool filed a reverse petition in Davidson County Chancery Court seeking a determination concerning the rights and responsibilities of the parties under the workers' compensation statutes. In a countercomplaint filed in January 2001, Ms. Pratt alleged that Whirlpool wrongfully terminated her. In September 2002, the chancellor[3] found in favor of Ms. Pratt on her workers' compensation claim and ruled that the wrongful termination claim should be tried separately.

Ms. Pratt's wrongful termination claim was tried in August and September 2007. The chancellor made detailed findings from the bench and found in favor of Ms. Pratt on her claim of retaliatory discharge. The court awarded her $77,144.00 in back pay and reinstatement to her job

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[2]The term "cold sample" is not defined in the record. According to the oral arguments, a cold sample is one that is below body temperature, thereby suggesting dilution or other tampering.

[3]The workers' compensation case was tried by Chancellor Irwin H. Kilcrease, Jr.

at Whirlpool. The court further ruled that, in the event that reinstatement was found on appeal not to be an appropriate remedy, Ms. Pratt was entitled to front pay in the amount of $225,540.00.

On appeal, Whirlpool argues that the trial court erred in finding that the company wrongfully discharged Ms. Pratt and that the trial court erred in calculating back pay.

STANDARD OF REVIEW

The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our consideration of the preponderance of the evidence "is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice,* 983 S.W.2d 680, 682 (Tenn. Ct. App. 1998). Review of a question of law is also de novo, but with no presumption of correctness given to the trial court's conclusions. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002).

ANALYSIS

I. Retaliatory Discharge

Tennessee law has long recognized the doctrine of employment-at-will under which an employer can discharge an employee "for good cause, bad cause or no cause at all." *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984). Nevertheless, our courts also recognize some limitations to this doctrine based upon public policy considerations. In *Clanton*, our Supreme Court found such an exception necessary to protect a worker's right to assert a claim for workers' compensation benefits:

> Retaliatory discharges completely circumvent this [workers' compensation] legislative scheme. Such discharges will have the effect of relieving the employer of its duty to compensate and the employee of his or her right to compensation.
> . . . .
> In our opinion, a cause of action for retaliatory discharge, although not explicitly created by the [workers' compensation] statute, is necessary to enforce the duty of the employer, to secure the rights of the employee and to carry out the intention of the legislature.

Clanton, 677 S.W.2d at 444-45. To establish a prima facie case of retaliatory discharge for asserting a workers' compensation claim, a worker must prove four elements:

> (1) The plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for workers' compensation benefits; (3) the defendant terminated the plaintiff's employment; and (4) the claim for workers'

> compensation benefits was a substantial factor in the employer's motivation to terminate the employee's employment.

Anderson v. Standard Register Co., 857 S.W.2d 555, 558 (Tenn. 1993).

Whirlpool asserts that Ms. Pratt failed to establish two of the required elements: (A) that she made a claim for workers' compensation benefits, and (B) that her claim for workers' compensation benefits was a substantial factor in her termination.

A.

On the issue of whether Ms. Pratt proved that she "made a claim" for workers' compensation benefits, credibility is a significant factor. Whirlpool focuses upon alleged inconsistencies between Ms. Pratt's testimony at the hearing and her testimony during depositions about her conversation with a person or persons at Whirlpool the day after her accident. Ms. Pratt testified at trial that, prior to Mr. Hagewood informing her that she was being terminated, she had asked him about whether her dental care would be covered by workers' compensation. In depositions, however, Ms. Pratt had not mentioned her inquiry about workers' compensation benefits when describing her conversation with Mr. Hagewood. Whirlpool also points to differences in Ms. Pratt's various accounts of the telephone call with respect to the identity and number of persons with whom she had talked. Whirlpool further points to Ms. Pratt's inability, during a deposition taken a week before trial, to remember important dates such as the year or month of her mother's death in a car wreck or the year when she moved to Mississippi.

On cross-examination, Ms. Pratt was questioned extensively about differences between her deposition testimony and her trial testimony. The trial court made specific findings of fact with respect to the telephone call and Ms. Pratt's credibility:

> At some point during the conversation the plaintiff asked Mr. Hag[e]wood if Whirlpool would pay for the dentist she would see that day and for her dental care for which she was waiting. The Court stated during the defendant's motion to dismiss that the plaintiff was a credible witness. She earned a low hourly wage, and it was reasonable and expected that she would be concerned about who would pay her dental bill. The Court is convinced that a discussion about future dental bills and specifically the bill for the dentist that she would see that day to deal with her dangling tooth, the Court is convinced that at some point during the termination conversation her dental bill was discussed. At that moment the plaintiff had no front teeth. . . .
>
> The plaintiff testified that the day following her injury one tooth was dangling. So the Court is convinced both by her demeanor, her explanations, the Court adds her gentle demeanor, that her tooth was dangling, that she was in a great deal of pain, that

> she did not get to see the dentist the night of or the day of the injury at the emergency room. But the court is convinced that she was waiting to see a dentist. . . .
>
> The Court is convinced that through all of those circumstances that the plaintiff carried her burden of proof to show that during the termination conversation with Mr. Hag[e]wood, the issue arose about who was going to pay the dentist.

A trial court's findings concerning issues of credibility are given considerable deference since the trial court has the opportunity to see and hear the testimony first hand and to observe witness demeanor. *Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). We cannot say that the evidence preponderates against the trial court's findings of fact concerning the telephone conversation and Ms. Pratt's credibility.

Whirlpool further argues that Ms. Pratt's inquiry concerning workers' compensation coverage for her dental bills does not constitute making a claim for worker's compensation benefits. The company asserts that Ms. Pratt's workers' compensation claim was not filed until January 2001 when she filed her answer to Whirlpool's reverse petition. Prior to that time, Whirlpool argues, Ms. Pratt never expressed an intent to file a lawsuit against it for workers' compensation benefits. Ms. Pratt responds that Whirlpool's interpretation of the "made a claim" element would undermine the public policy underlying the retaliatory discharge cause of action "since employers would be free to discharge employees at any time up until a lawsuit were filed."

We addressed a similar issue in *Elliott v. Blakeford at Green Hills*, No. M2000-00365-COA-R3-CV, 2000 WL 1817228 (Tenn. Ct. App. Dec. 13, 2000). Ms. Elliott worked as a food services manager at a retirement home. *Elliott*, 2000 WL 1817228, at *1. She approached the facility's executive director, informed him that she had hurt her hand in the kitchen, and asked whether her medical insurance would cover the cost of surgery. *Id*. at *1-2. Neither she nor the director specifically mentioned workers' compensation benefits. In fact, the director remained silent about the possibility of workers' compensation coverage and acquiesced in the suggestion that Ms. Elliott pay for additional insurance coverage under COBRA. *Id.* at *2. In considering whether Ms. Elliott had "sought workers' compensation benefits,"[4] the court made the following observations:

> While the Workers' Compensation Act sets out specific procedures to follow when applying for benefits, we did not define [in *Sasser v. Averitt Express, Inc.*, 839 S.W.2d 422 (Tenn. Ct. App. 1992)] the exact steps an employee must take in order to be deemed to have "sought workers' compensation benefits" for purposes of a retaliatory discharge action. This was not an oversight. Keeping that requirement flexible protects the employee from an employer who might be tempted to evade the law by obstructive tactics or by discharging her before she can take any specific steps.

[4]This language comes from *Sasser v. Averitt Express*, *Inc.*, 839 S.W.2d 422, 426 (Tenn. Ct. App. 1992).

Elliott, 2000 WL 1817228, at *4. Noting that the director failed to take any of the steps required by law once Ms. Elliott informed him that she had been injured on the job, the court concluded that Ms. Elliott should not be found to have waived her rights by failing to mention workers' compensation until after she realized she was being terminated. *Id.* at *5.

In *Woodard v. Morgan Tire & Auto, Inc.*, No. 3:05-0681, 2006 WL 2850323 (M.D. Tenn. Oct. 2, 2006), a case involving a retaliatory discharge claim under Tennessee law, the federal district court cited *Elliott* and determined that summary judgment was not proper even though the employee had not formally filed a workers' compensation claim or sought assistance from the Department of Labor before he was terminated. *Woodard*, 2006 WL 2850323, at *6. The employer in *Woodard* knew the employee had injured his shoulder at work, and the employee had inquired about how to file a workers' compensation claim. *Id.* The court stated that "[a] reasonable jury could readily conclude in this case that the employer was aware of a compensable injury . . . ." *Id.*

We have concluded that Ms. Pratt's actions in this case were sufficient to make a claim for workers' compensation benefits for purposes of her retaliatory discharge claim. Whirlpool knew that Ms. Pratt had been injured at work,[5] and the trial court found that she inquired about workers' compensation coverage prior to her termination. Moreover, Whirlpool's filing of the reverse petition within three days of the injury evidences the company's awareness of possible liability for workers' compensation.

B.

The second contested element of the retaliatory discharge claim is whether Ms. Pratt established that her workers' compensation claim was a substantial factor in her termination.

To establish the causation element, the employee may rely on direct evidence or upon compelling circumstantial evidence. *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 685 (Tenn. Ct. App. 1999). Circumstantial evidence may include:

> [T]he employer's knowledge of the compensation claim, the expression of a negative attitude by the employer toward an employee's injury, the employer's failure to adhere to established company policy, discriminatory treatment when compared to similarly situated employees, sudden and marked changes in an employee's performance evaluations after a workers' compensation claim, or evidence tending to show that the stated reason for discharge was false.

Newcomb v. Kohler Co., 222 S.W.3d 368, 391 (Tenn. Ct. App. 2006). Once the employee proves a causal link between the workers' compensation claim and the employee's discharge, the burden

[5] Although Ms. Pratt did not make the argument in this case, Whirlpool's knowledge of Ms. Pratt's injury at work, alone, would probably be sufficient to support a claim for retaliatory discharge even if she had not inquired about benefits on the phone.

of proof shifts to the employer to show "a legitimate, non-pretextual reason for the employee's discharge." *Anderson*, 857 S.W.2d at 559.

Whirlpool asserts that Ms. Pratt's termination resulted solely from the fact that she gave a cold sample and was not related to her workers' compensation claim. Whirlpool's separation notice states that Ms. Pratt was discharged for violation of the substance abuse policy. Mr. Hagewood testified that it was Whirlpool's longtime policy to drug test anyone injured on the job. Whirlpool's official written policy, however, provided for drug testing after on-the-job injuries only in cases involving employee negligence when a three-person panel decided that testing was appropriate. Although Mr. Hagewood testified that he modified the substance abuse policy to provide for testing after all injuries at work, the written policy was never changed. According to Mr. Hagewood, it was also Whirlpool's consistent policy to terminate anyone who failed to cooperate with the substance abuse policy and to give a usable sample. Whirlpool presented evidence to support its contention that it had consistently applied its substance abuse policies for years. Whirlpool further asserts that Mr. Hagewood's duties did not include workers' compensation claims and that he unilaterally decided to terminate Ms. Pratt based solely upon her violation of the unwritten company substance abuse policy.

The trial court made specific findings concerning the reasons for Ms. Pratt's termination, including the following:

> [T]he only proof that Whirlpool has that the urine sample was cold was a fax from a Mr. Carlson whose credentials and background are not in evidence. . . . [T]he only proof Whirlpool had was that the urine sample was cold, that it was diluted, was a fax from Mr. Carlson about whom the Court knows nothing. And the Court believes and finds that Whirlpool didn't know anything about him either. This is contrary to Whirlpool's policy that the urine sample would be conducted by proper means and by a medically appropriate manner. The Court just doesn't have any information and no proof that the policy was followed. . . .
>
> The Court carefully listened to the plaintiff [as] she testified and as she was cross-examined. She is frail at this time, and she was frail at that time as shown by the medical records, that is, she was not a heavy person and not a strong person. She was willing to give the sample, and the only thing that she wasn't willing to do was to be catheterized. . . . [T]here was no proof that the plaintiff had ingested or was using drugs at work or otherwise, that is, the five substances that would be illegal substances such as marijuana. . . . [T]here was scant proof that the sample was cold. There was no proof regarding how it came to be cold and what Mr. Carlson meant when he said it was a cold sample. Neither Mr. Hag[e]wood nor any other person at Whirlpool investigated the situation or questioned Mr. Carlson to determine who he was or how he came to his conclusion. . . .

> In both cases, both the workers' compensation trial and this trial, Whirlpool just had no proof to support its theory that Ms. Pratt–that there was some reason to fire Ms. Pratt. And the Court must find that the reason for firing her was pretextual and that the request to have her dental care paid for was a substantial factor. It probably was not the only substantial factor. The other substantial factor was that Mr. Hag[e]wood for some reason felt that a simple sentence that she provided a cold sample was enough in itself. And whether it was or whether it wasn't, the other substantial factor was that she was going to seek medical care for her teeth and she was going to ask that Whirlpool pay for the medical care.

The trial court made additional findings to address "all of the circumstantial evidence that causes the Court to conclude that there's a connection between the termination and the workers' compensation claim." In addition to citing the proximity in time between Ms. Pratt's making of a claim and her termination, the court found that Whirlpool's filing of a reverse petition within three days of Ms. Pratt's injury showed that "Whirlpool was thinking about what it was going to do about the dental care." The court noted that Whirlpool could have used the blood that had already been drawn to test for drugs in Ms. Pratt's system, especially in light of the nature of her injuries. The court went on to note that the term "cold sample"[6] was not defined in Whirlpool's drug policy and that Mr. Hagewood did not know the medical protocol involved in collecting the urine sample. After discussing the evidence, the court found that "taking all these pieces together, the plaintiff has carried her burden of proof to prove the elements of the cause of action, and the defendant, the employer, has not been able to show that it had a legitimate reason for terminating her."

On this issue, too, credibility plays a key role. The evidence does not preponderate against the trial court's factual findings, including its determination that Ms. Pratt's workers' compensation claim was a substantial factor in her termination and that the reason asserted by Whirlpool was pretextual.

II. Damages

Whirlpool challenges some of the assumptions used by the trial court in calculating the amount of lost earnings. For the years 2001, 2002, and 2003, the trial court assumed that Ms. Pratt would have worked 40 hours a week for 26 weeks. Whirlpool argues that the trial court should have based the projected number of hours worked on the average number of hours worked by Ms. Pratt during the preceding three years (1998 through 2000), or 36.03 hours a week. Instead, the trial court looked at Ms. Pratt's average weekly hours in 2003 of 39.13 hours and rounded up to 40 hours a week. The trial court found that "[i]t is only fair to judge her work history by the most recent work year, not when she was first hired." Whirlpool cites no authority that would require the trial court to look to the prior three years, and we cannot say that the court erred in its decision to base its calculations on the most recent year.

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[6] As noted above, Whirlpool presented no proof that Mr. Carlson had any training or expertise to qualify him to perform urine testing or to identify a cold sample.

With respect to the years from 2004 through 2007, the trial court assumed that Ms. Pratt would have worked fulltime, or 52 weeks a year. Whirlpool argues that this assumption is not supported by the evidence. In assuming that Ms. Pratt would have begun working fulltime beginning in 2004, the trial court credited the testimony of Mr. Hagewood:

> Q. How long does it take, or approximately how long would it take in terms of number of years for a person to build up enough seniority not to get bumped off or laid off at some time?
>
> A. Well, it varies year to year, but I say a rule of thumb is five or six.
>
> Q. So you would have to be an employee there that many years to avoid the layoff?
>
> A. You would, yes.
>
> Q. At that time?
>
> A. Right.
>
> Q. Has that changed some since then?
>
> A. Well, it's higher than that now.

On cross-examination, Mr. Hagewood testified further:

> Q. Now, when talking about these layoffs, you said that–and if I understood you correctly, that it would take five or six years then, but not now, for someone to become layoff proof in the production field; is that correct?
>
> A. I believe that's close, yes.
>
> Q. And can I extrapolate from that testimony that an individual that was hired in 1998 would have hit that level either in 2003 or 2004?
>
> A. Well, if you add the five or six, that's right.

Thus, the trial court's assumption that Ms. Pratt would have worked fulltime as of 2004 has support in the evidence.

Whirlpool argues that even a fulltime production worker would not have worked 52 weeks a year. The company cites in particular testimony from Mr. Hagewood and payroll supervisor Connie Cooke to the effect that the air conditioning business was in decline, that even workers who survived the mid-year seasonal layoff were subject to subsequent sales and marketing layoffs, and

that even production workers who survived these layoffs did not work 52 weeks a year. Whirlpool did not, however, present any evidence as to how many weeks fulltime production workers actually worked in those years. In the absence of such evidence, the trial court reasonably estimated that a fulltime production worker would work 52 weeks a year.

There is an issue as the amount of lost wages attributed to the year 2007 by the trial court. Based upon a pay rate of $13.00 per hour,[7] the trial court correctly stated that Ms. Pratt would have earned $27,040 for the entire year. The hearing was in late September 2007, so the trial court needed to calculate lost earnings for January through September 2007. The trial court estimated that Ms. Pratt would have earned 90% of her yearly wages by the end of September 2007, resulting in a figure of $24,336 for the partial year. The 90% figure is erroneous, however, since only 75% of the year would have elapsed at the end of September. The correct amount would be $20,280.

Whirlpool also identified a few minor discrepancies with respect to the calculation of Ms. Pratt's actual earnings after she left Whirlpool. A comparison of Ms. Pratt's tax returns and her damages calculations indicates that her earnings in 2004 should have been $7,955 instead of $7,633 and in 2006 should have been $11,321 instead of $11,805. Ms. Pratt submitted that she had earned $4,936 in 2007. There is no evidence to support Whirlpool's contention that this amount did not reflect earnings for September 2007.

In light of the errors identified above, we calculate that Ms. Pratt's total lost wages should have been $131,834 rather than $135,890 and that her actual earnings should have been $58,584 rather than $58,746. Subtracting earnings from total back wages results in a back pay award of $73,250. There is a difference of $3,894 when this figure is compared to the trial court's award of $77,144. We conclude, therefore, that the trial court's damages award should be reduced to $73,250.

CONCLUSION

We modify the damages award to $73,250.00 and affirm the decision of the trial court with this modification. The costs of this appeal shall be assessed against the appellant, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

[7] The trial court based the estimated yearly rates of pay on figures proposed by Ms. Pratt, which were actually lower than those given by Whirlpool in its damages calculations.